

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air  
Warming Devices Products  
Liability Litigation  
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)  
) File No. 15-MD-2666  
) (JNE/FLN)  
)  
) March 24, 2016  
) Minneapolis, Minnesota  
) Courtroom 12W  
) 11:00 a.m.  
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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL  
UNITED STATES MAGISTRATE JUDGE

And THE HONORABLE WILLIAM H. LEARY III  
RAMSEY COUNTY JUDGE

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12 transcript produced by computer.

1                                   P R O C E E D I N G S

2                                   (9:36 a.m.)

3                                   IN OPEN COURT

4                                   (11:02 a.m.)

5                   THE COURT: Good morning. I think it's still  
6 morning. Please be seated.

7                   We are here for a regularly scheduled conference  
8 in In Re: Bair Hugger, the MDL. And Judge Noel and I along  
9 with Judge Leary have had a conference in chambers, and I  
10 think that we have made some good progress, but I do  
11 apologize for the wait for those of you who have been out  
12 here and then also for those of you who are on the  
13 telephone. So do we have the telephone people? Can you  
14 hear us?

15                   UNIDENTIFIED SPEAKER: Yes.

16                   THE COURT: Okay, I heard someone say "yes."

17                   UNIDENTIFIED SPEAKER: I'm here too.

18                   THE COURT: Okay, that's good. I'm going to take  
19 appearances from the folks here in the courtroom. Start  
20 with plaintiff.

21                   MR. GORDON: Your Honor, Ben Gordon for the  
22 plaintiffs.

23                   MS. ZIMMERMAN: Your Honors, Genevieve Zimmerman  
24 for plaintiffs.

25                   MR. CIRESI: Michael Ciresi on behalf of the

1 plaintiffs.

2 MR. SACCHET: Michael Sacchet on behalf of the  
3 plaintiffs.

4 THE COURT: And anybody else who wants to be  
5 identified? Nope? Mr. Blackwell, your side.

6 MR. BLACKWELL: Yes, Your Honor. Jerry Blackwell  
7 speaking for 3M.

8 MS. AHMANN: Bridget Ahmann for 3M.

9 MR. GORDON: Corey Gordon for 3M.

10 MS. YOUNG: And Mary Young for 3M.

11 THE COURT: Judge Noel and I are here together on  
12 the bench presiding, and Judge Leary is here in the  
13 courtroom. Thank you very much again, Judge Leary, for  
14 coming over.

15 JUDGE LEARY: Thank you for inviting me over.

16 THE COURT: Phone participants, I'll list the  
17 names I have, and if I don't say your name, speak up and let  
18 me know that you're there, would you please?

19 I've got Annesley DeGaris, Joe Waechter, Julie  
20 Jochum, Roberto Blun, Lila Razmara, Nicholas Rockforte,  
21 Brian Tadtman, Michael Goetz, Eldon Korshidi, John Pappas,  
22 Kaitlyn Neufeld, and Dean Xenick.

23 MR. GORDON: Xenick, Your Honor.

24 THE COURT: Xenick.

25 MR. WALKER: Your Honor, Travis Walker.

1 THE COURT: Could you spell that, please?

2 MR. WALKER: T-R-A-V-I-S W-A-L-K-E-R.

3 THE COURT: Okay, thank you. Anybody else? All  
4 right.

5 MS. ANDREWS: Your Honor, Anne Andrews is on.

6 MR. GORDON: Anne Andrews, a member of our PEC,  
7 Your Honor.

8 THE COURT: Anybody else?

9 All right. We have the benefit of a joint agenda,  
10 and the bulk of our time will be spent on the case  
11 management order. After lengthy discussions in chambers, it  
12 is our plan to issue an order directing you to prepare a  
13 detailed pretrial order with the following calendar items:

14 April 29, 2016, parties submit a proposed  
15 protective order and ESI protocol on or before that date.

16 Initial disclosures required by 26(a)(1) that  
17 pertain to the issue of general causation to be completed on  
18 or before April 29, 2016.

19 Master long form and master short form complaints  
20 to be filed and served on or before April 29, 2016. That's  
21 all the same date there.

22 A science day, which will be an educational  
23 tutorial not to be on the record, and to last four hours, no  
24 more than four hours, will be held on May 19, 2016.

25 Answers to the long form complaint may be filed no

1 later than July 8, 2016.

2 Motions to dismiss parties or claims in the master  
3 long form complaint may be filed no later than July 8, 2016.

4 Plaintiffs may amend the master long form and  
5 master short form complaints without leave of court on or  
6 before July 29, 2016.

7 Parties to propose a form plaintiff fact sheet and  
8 a service protocol on or before August 19, 2016.

9 Fact discovery on the issue of general causation  
10 to be commenced any time now, but in time to be completed by  
11 October 3, 2016.

12 Plaintiff fact sheets shall be filed no later than  
13 90 days after the Court adopts the form plaintiff fact  
14 sheet.

15 The parties shall propose a plan, which would be a  
16 criteria protocol for the selection of bellwether cases on  
17 or before October 17, 2016. And that is the date for  
18 proposing a plan to select the bellwether cases not, of  
19 course, the actual selection of the bellwether cases.

20 The pool of bellwether cases will be cases filed  
21 in or removed to or transferred to this court on or before  
22 December 19, 2016.

23 Then as to experts on general causation, initial  
24 expert reports and disclosures of the identity of expert  
25 witnesses under 26(a)(2) to be exchanged on or before



1 December 1, 2016.

2 Rebuttal expert reports and disclosures of the  
3 identity of rebuttal expert witnesses shall be exchanged on  
4 or before February 1, 2017.

5 Depositions of expert witnesses to be completed on  
6 or before April 1, 2017.

7 Then March 1, 2017, for the bellwether cases to be  
8 selected. So on or before March 1, 2017, bellwether cases  
9 selected.

10 Initial disclosures required by 26(a)(1) that  
11 pertain to the bellwether case specific issues shall be  
12 completed on or before March 8, 2017.

13 Motions to amend the master long form and master  
14 short form complaints to include punitive damage claims may  
15 be filed no later than April 21, 2017.

16 Daubert motions and other dispositive motions as  
17 defined under the local rules of this Court may be filed no  
18 later than June 15, 2017.

19 Bellwether case specific discovery shall not be  
20 commenced earlier than March 2, 2017, and shall be completed  
21 no later than July 1, 2017. And the first bellwether trial  
22 shall commence November 6, 2017.

23 If there are glitches or little problems with that  
24 schedule, the parties will discuss those and bring them to  
25 our attention if necessary. But the beginning, the big

1        dates are firm there. Judge Noel, would you say that's  
2        right?

3                MAGISTRATE JUDGE NOEL: Yes.

4                THE COURT: The next item on the joint proposed  
5        agenda is an update on the number and status of cases  
6        transferred to the MDL. Anybody want to say anything about  
7        that beyond what's here?

8                MR. SZERLAG: Good morning, Your Honor. David  
9        Szerlag, liaison counsel. As of this morning, I believe we  
10       have 177 cases that have either been filed or transferred to  
11       this court.

12               I also, just as a quick followup on the state  
13       court cases, other than the ones pending in Ramsey County, I  
14       believe there are five cases that are filed in other  
15       jurisdictions. There really hasn't been any, I spoke with  
16       attorneys representing plaintiffs on three of those five  
17       cases. There really isn't a lot of movement afoot on  
18       discovery or even scheduling orders at this particular point  
19       in time, but counsel had indicated that they'll certainly  
20       keep us up to date with what's happening in state court  
21       actions.

22               THE COURT: Would you mind coming to the podium  
23       just because I'm worried that the people on the phone won't  
24       be able to hear you.

25               The cases that are contained in the pretrial, the

1 agenda, include this Wilshire case in Madison County,  
2 Illinois, and it looks like not much is happening there so  
3 far.

4 MR. SZERLAG: Could I just get my notes then for  
5 the specific cases.

6 THE COURT: Yes.

7 MR. SZERLAG: Thank you.

8 The Wilshire case, I spoke with Attorney Hopkins  
9 and his case is pending in the Madison County, Illinois,  
10 court. There is a medical malpractice component to that  
11 case as well against the doctor and the hospital. He  
12 indicated that 3M did file a motion to dismiss, but at this  
13 particular time, nothing was scheduled. There was no  
14 hearing scheduled, and there was no status conference  
15 scheduled as well.

16 THE COURT: They might not even have a judge yet,  
17 right?

18 MS. SZERLAG: Attorney Hopkins did not tell me  
19 that. I believe that I learned that from the defendant's  
20 filing.

21 MS. AHMANN: Yes, Your Honor, I think a new judge  
22 was just assigned. The third judge was assigned like two  
23 days ago.

24 THE COURT: Okay. Then I've got the Rodriguez  
25 case where apparently there's an initial scheduling

1 conference going on right now or maybe they're already done,  
2 March 24, 2016, and that's another Illinois case. This one  
3 in Lake County.

4 MR. SZERLAG: Again, I believe the defendant's  
5 filing indicated I believe March 22nd or 23rd for a status  
6 conference. Plaintiff's counsel told me it was the 17th.  
7 He was going to be out of town, but his partner was going to  
8 cover that and that they would get back to me, and I have  
9 not heard anything back there as well.

10 Apparently, there has been a lot going -- well,  
11 the case was non-suited for a year, and it was just recently  
12 reinstituted. No discovery as of yet, and there were  
13 multiple claims. I believe there was an allegation against  
14 Medtronic as well as manufacturer of a spinal fusion device.

15 THE COURT: And there was a motion to dismiss  
16 filed by 3M in that case, maybe?

17 MS. AHMANN: Yes.

18 THE COURT: Okay. Lawson, which is in Texas.

19 MR. SZERLAG: Lawson, I spoke with Attorney  
20 Hopkins. He indicated that he was local counsel for the  
21 Housseirre Law Firm which has the other case that's pending  
22 in Harris County.

23 THE COURT: Childers?

24 MR. SZERLAG: Yes. I was unable to connect with  
25 Attorney Housseirre, but I know Mr. Gordon has had some

1 discussions with him within the last couple of days.

2 MR. GORDON: I did, Your Honor. Just yesterday, I  
3 had a call from Mr. Housseirre, and he indicated an intent  
4 to move forward with this case pursuant to the Texas rules.  
5 I felt like he had an obligation based on the negligence  
6 hospital-based portion, the hospital defendant, I think, but  
7 that he would be happy to work with us in this court in  
8 terms of trying to coordinate aspects of that discovery, and  
9 I don't have anything more formal than that, Your Honor.

10 THE COURT: All right. Thank you very much.

11 Now, that's all I have. I think that's four, so  
12 there is there a fifth?

13 MR. SZERLAG: There's one other case, Your Honor.  
14 It was the Martin case, which had been filed in the state  
15 Court in Louisiana that had been transferred to the Xarelto  
16 MDL with Judge Fallon, I believe. And my understanding is I  
17 actually got a communication from Attorney Sintola and he  
18 indicated that Judge Fallon, I believe, issued a stay, and  
19 that that case will remain in the Xarelto MDL.

20 THE COURT: Is there anything that we need to do  
21 about that or just be aware of it? That's just the one  
22 plaintiff, right?

23 MR. SZERLAG: One plaintiff, and my understanding  
24 is that Judge Fallon was going to contact Your Honor. That  
25 was the last I heard.

1 THE COURT: Okay.

2 MS. YOUNG: Your Honor, if I may, I know there was  
3 a status conference in Xarelto, and the parties represented  
4 that they would report back at the next status conference  
5 after we had a chance to raise the issue with Your Honor.  
6 And I understand that Your Honor's position is that that  
7 case can stay in --

8 THE COURT: I don't have any basis for any other  
9 decision. I don't know any more than what's in here, so I  
10 --

11 MR. SZERLAG: Okay, my understanding was that  
12 Judge Fallon did issue an order staying the case and  
13 indicating that it was going to stay in Louisiana. I can  
14 certainly see if I can get a copy of the Order and provide  
15 it to the Court.

16 MS. YOUNG: The Order is just simply a stay as to  
17 deadlines as to 3M, but I do think Judge Fallon had no  
18 problem with the case remaining there, and just asked that  
19 we alert Your Honor to the case. But we can report back  
20 that it will remain in --

21 THE COURT: Well, does anybody think it should be  
22 pulled out of Xarelto? I mean I don't independently think  
23 it ought to be pulled out of that and put here, but let's --

24 MS. YOUNG: 3M's position is that it can remain in  
25 that MDL.

1 THE COURT: I'll let you have another minute to  
2 discuss, but I just before Judge Leary has to leave, Judge  
3 Leary, you are not going to have your conference tomorrow.

4 JUDGE LEARY: I actually have a conference on  
5 Friday. I won't reschedule a conference until after the  
6 next conference we have in federal court.

7 THE COURT: Okay.

8 JUDGE LEARY: And I have an executive team meeting  
9 that I need to get to.

10 THE COURT: No problem. I just wanted to make  
11 sure that we knew that. And then also just I know before  
12 you leave, this science day, I'm wondering whether we  
13 couldn't invite, I mean Judge Leary, obviously, but what  
14 about some of these other state judges?

15 MR. GORDON: Certainly, Your Honor.

16 MS. ZIMMERMAN: Happy to do that.

17 MR. SZERLAG: I'll certainly try to reach out too.

18 THE COURT: I can do it. I just wanted to check  
19 with you and see if that was okay. Thank you very much.  
20 See you again.

21 (Judge Leary exits courtroom. )

22 THE COURT: All right. So you may report back to  
23 Judge Fallon that Martin will remain with Xarelto.

24 MS. YOUNG: Thank you, Your Honor. I'll do that.

25 THE COURT: Anything else from our liaison?

1 MR. SZERLAG: I don't believe so, Your Honor. I  
2 think that covers those out-of-state cases. Thank you.

3 THE COURT: Excellent.

4 Now, common benefit order was the next item.

5 MS. ZIMMERMAN: Yes, Your Honor. I think there's  
6 nothing specific to report at this time other than we will  
7 have a formal proposal to Your Honor for the Court's  
8 consideration by the April status conference.

9 THE COURT: Excellent. And the e-mail service of  
10 process and direct filing of cases is not -- was not able to  
11 be completed by today, but you are still hopeful that you'll  
12 be able to work out something on that; is that correct?

13 MS. ZIMMERMAN: Yes, Your Honor, that's right.  
14 And I believe that Ms. Young for 3M has red lines from us,  
15 and we'll continue to work together and hope to have  
16 something proposed to Your Honor quickly.

17 THE COURT: Okay, that's great. And then the  
18 summary of facts for the website, we'll still take that  
19 whenever you can get it done.

20 MS. ZIMMERMAN: Thank you.

21 THE COURT: Judge Noel?

22 MAGISTRATE JUDGE NOEL: I have nothing further.  
23 Thank you.

24 THE COURT: What about from counsel? Mr. Gordon?

25 MR. GORDON: Yes, Your Honor. Just with respect



1 to the next hearing date.

2 THE COURT: Oh, yes, and we should make sure that  
3 the folks on the line know that. Because of a conflict with  
4 at least some of the lawyers, we have had to move the  
5 April 21st date, and we moved that to Friday, April 29th.  
6 And we've selected 10:00 a.m. as the time for that next  
7 status conference. So there will not be a status conference  
8 on April 21st, but there will be one on Friday, April 29th  
9 at 10:00 a.m.

10 MR. GORDON: Thank you, Your Honor.

11 MR. BLACKWELL: One other thing, Your Honor, and  
12 this is mostly a question I have for plaintiffs than for the  
13 Court. But we've been seeing this uptick in medical device  
14 reports that look strikingly like complaints in the  
15 litigation with some embellishment. And they're anonymous.  
16 I don't know if the lawyers in the courtroom are involved in  
17 submitting those. If so, we have something to talk to them  
18 about. If not, then we don't have anything to talk about.

19 THE COURT: I'm sorry, what reports are you  
20 talking about?

21 MR. BLACKWELL: Medical device reports related to  
22 --

23 MR. GORDON: MDRs, this is the first I've heard of  
24 this, Your Honor. I'm kind of blindsided. I have no idea  
25 what --

1 MR. BLACKWELL: I'm not trying to blindside you.  
2 It's just that they are being filed anonymously all of a  
3 sudden. They seem to look like complaints in the lawsuit.

4 MAGISTRATE JUDGE NOEL: Where did they get filed?  
5 I don't know what you're talking about.

6 MR. BLACKWELL: I'm sorry, with the FDA, Your  
7 Honor.

8 MR. GORDON: There's a process for the FDA for  
9 anyone to report medical device related problems. It's news  
10 to me. I have no idea. I haven't done it. But, you know,  
11 whether or not others have, I don't know if there's anything  
12 --

13 THE COURT: Yes, maybe you ought to just talk  
14 amongst yourselves.

15 MR. BLACKWELL: We will, Your Honor.

16 MR. GORDON: Appreciate it.

17 THE COURT: Thank you.

18 MAGISTRATE JUDGE NOEL: Anything else,  
19 Mr. Blackwell?

20 MR. BLACKWELL: No, Your Honor.

21 THE COURT: All right. Well, thank you all very  
22 much. I appreciate it. Look forward to seeing you at the  
23 end of April, and perhaps receiving some other submissions  
24 from you in the meantime. Any problems, call, of course.

25 MR. GORDON: Thank you very much.

1 MR. BLACKWELL: Thank you, Your Honor.

2 THE COURT: We're in recess.

3 (Court adjourned at 11:23 a.m.)

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8 I, Maria V. Weinbeck, certify that the foregoing is  
9 a correct transcript from the record of proceedings in the  
10 above-entitled matter.

11

12 Certified by: s/ Maria V. Weinbeck

13 Maria V. Weinbeck, RMR-FCRR

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